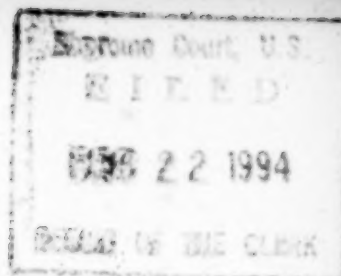


No. 93-1159



IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

LINDA WINFIELD, WILLIAM H. WINFIELD, JR., and
LINDA WINFIELD d/b/a the PROLIFE ACTION
LEAGUE OF GREENSBORO,
Petitioners,

v.

RICHARD D. KAPLAN, M.D., MARGUERITE KAPLAN, and
MARGUERITE KAPLAN as guardian ad litem for
JACOB M. KAPLAN and DAVID S. KAPLAN,
Respondents.

On Petition for Writ of Certiorari to the
North Carolina Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

After a group appeared twelve times at a doctor's home, and after a person associated with that group threatened the doctor's life, a state trial court entered a preliminary injunction barring the group from similar picketing and threats pending trial on the merits. This temporary injunction bars the group from picketing and similar activities on or within 300 feet of the doctor's street, but does not affect the group's leafletting or other expressive conduct. On an interlocutory appeal, the state court of appeals affirmed. The state supreme court dismissed a further appeal for lack of a substantial constitutional question and denied discretionary review.

1. Does a petition for certiorari filed 103 days after entry of the relevant order fall within this Court's jurisdiction?
2. Is a state supreme court's order declining to review an affirmance of an interlocutory injunction a "final judgment[] or decree[]" under 28 U.S.C. § 1257(a) (1988)?
3. Is an injunction granted to prevent a thirteenth repetition of targeted picketing by the same group a prior restraint?
4. Is an injunction that makes no reference to the expressive content of any activity, and is justified by the physical effects of the enjoined activity, content-based?
5. Does the injunction described above violate the federal constitutional right to free speech?

PARTIES

The respondents dispute the petitioners' characterization of the Prolife Action League of Greensboro (the League) in the caption of the petition. The respondents have sued the League as an entity that is separate from Linda Winfield. *See infra* p. 2 n.2.

After the filing of the petition, the respondents identified the following people, who had previously been sued as "Doe" defendants:

Scott Allred
 Leigh Allred
 Stephen Michael Beall
 Karen L. Beane
 Virginia Bell
 Sharon Steele Clark
 Mariana Donadio
 Ruth Douglas
 Libby Dunsmore
 Rhonda Edmonds, a/k/a Rhoda Edmonds
 Theresa Farley
 Pamela Ford
 Yvonne Ford
 D. Craig Fox
 Hariette Gabriele
 Georgia Gaines
 Elsie Galan
 Karin Grubbe
 Deborah Hebestreit
 Seth Hinshaw
 Albert Hodges
 Betty White Kellenberger
 Richard Kellenberger
 Jeffrey Alexander Kendall
 Father Conrad Kimbrough
 B.A. Kuhl, a/k/a Bud Kuhl

Carol Kuhl
 Kathy Lanham
 Joseph Lanham
 Dr. Eileen Lopp
 Dianne McClamroch
 Julian McClamroch
 Bernard McHale
 Elaine McHale
 Rebecca Morrison
 Ginny O'Hara
 Monica Pollard
 Duane Richardson
 Marta Richardson
 Candido Rosario, a/k/a Candido Rosario Matos
 Elizabeth D. Salter, a/k/a Betty Salter
 Kimberly Schimmel
 Dr. Keith Schimmel
 Jane Sechler
 Annabelle Simpson
 Betty Steinkamp
 Ronald Steinkamp
 Lynn Thompson
 John Thompson
 Laurel Treddinick, and
 Amber Winfield.

None of these former "Doe" defendants is a party to this interlocutory appeal.

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JURISDICTION

The North Carolina Court of Appeals announced its decision on 20 July 1993. The North Carolina Supreme Court entered its order dismissing the petitioners' appeal and denying discretionary review¹ on 7 October 1993. The petition was filed 103 days later, on 18 January 1994.

The petition was filed out of time. *See* 28 U.S.C. § 2101(c) (1988). In addition, this case does not involve a "final judgment[] or decree[]" by the North Carolina courts. 28 U.S.C. § 1257(a). For both of these reasons, this Court lacks jurisdiction. *See infra* pp. 6-10.

STATUTES INVOLVED

The respondents disagree that this Court should reach the merits of the petition under the First and Fourteenth Amendments. *See* Pet. at 2; *infra* pp. 6-11. The text of 28 U.S.C. §§ 2101(c) and 1257(a) appears in the appendix to this brief.

STATEMENT OF THE CASE

Facts

Richard Kaplan is an obstetrician and gynecologist who practices primarily in Greensboro, North Carolina. Dr. Kaplan, his wife Marguerite, and their two sons live in a quiet residential neighborhood in Greensboro. Dr. Kaplan provides abortions as one part of his practice.

In November 1990, the Kaplans became aware that Dr. Robert Wein, a colleague of Dr. Kaplan, had been accosted at his home by a group of picketers. The picketers had vowed to

¹For brevity, the rest of this brief will refer to this order as the order dismissing the petitioners' appeal.

continue appearing at the Weins' home until Dr. Wein stopped providing abortions. Dr. Wein had quickly complied with the picketers' demands.

On 15 January 1991, a group of fifteen to twenty people, apparently associated with the Prolife Action League of Greensboro (the League),² picketed on the street outside the Kaplans' house. The League's members walked back and forth on the Kaplans' short street, but the Kaplans' house was their unmistakable target. They targeted the Kaplans' house by centering their route on it and by carrying signs that named Dr. Kaplan. *Compare* Pet. at 4 (asserting that the League simply "walked through the Kaplan[s'] neighborhood") with Pet. App. at 45a (finding that "[a]lthough these moving pickets go beyond the frontage of the Kaplans' house, they remain largely in sight of the Kaplans' house").

In the year before the Kaplans filed this lawsuit, the League came back to the Kaplans' house and repeated this picketing at least eleven times. The League's repeated appearances frightened and intimidated the Kaplans, virtually imprisoning them in their house. Facing this abuse in their own home, and knowing that it could recur at any time, caused lasting distress for the Kaplan family. In addition, the League often used small children in its picket lines; as a result, the Kaplans and their neighbors had to drive in fear of hitting one of these children by

²The Kaplans have sued all of the activists who have harassed them, but as of the time of the preliminary injunction, they had identified only William and Linda Winfield, Ronald Benfield, and the League by name. Only the Winfields and the League have appealed the preliminary injunction. Since the unidentified defendants, as well as the Winfields, have carried out the picketing in question, this brief will use "the League" to refer to any relevant group that includes these people. *Compare* Pet. at 5 (asserting that the League is a mere title or banner for Linda Winfield) with *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 36, 431 S.E.2d 828, 847, Pet. App. at 1a, 40a (rejecting League's argument that it is not an organization), *appeal dismissed and disc. rev. denied*, 335 N.C. 175, 436 S.E.2d 379 (1993).

accident. The picketing disconcerted the Kaplans' neighbors, making them stay indoors to avoid a confrontation.

The League compounded the effect of its picketing by dropping off gruesome leaflets in the Kaplans' and other neighborhoods. It also picketed at Dr. Kaplan's medical office and at an abortion clinic where he sometimes works, disseminated private facts about the Kaplans, and made false public statements about Dr. Kaplan.

Near the beginning of the League's campaign, William Winfield accosted Dr. Kaplan and asked what he had to do to make Dr. Kaplan stop providing abortions. This statement showed that Winfield intended to achieve his goal by any means necessary.

Defendant Ronald Benfield has made less subtle threats. On 8 August 1991, about midway through the League's picketing campaign, Benfield came to the clinic where Dr. Kaplan sometimes works. After talking with the Winfields, Mr. Benfield approached Dr. Kaplan and said: "You're mine. You killed my baby. I'm going to kill you. Don't fear God, fear me." This statement led Mr. Benfield to be convicted of communicating a threat. In light of all the other ways the League has harassed the Kaplans, as well as Benfield's evident connection with the League, *see* L. Winfield Aff. ¶¶ 27-30 (admitting that the Winfields have met three times with Benfield, including two meetings after 8 August 1991), Benfield's threats magnified the Kaplans' fear for their safety and made them feel constantly tense, even at home.

The League's harassment campaign reached a peak in mid-November 1991, when the League appeared at the Kaplans' home for three straight days. On the third day, at the Kaplans' request, counsel spoke with the picketers, asking them simply to leave the Kaplans alone at their home, and informing them that if they picketed the Kaplans' home again, the Kaplans would be forced to pursue legal remedies. William Winfield

replied that the picketing would continue until Dr. Kaplan stopped providing abortions.

On 21 November 1991, the day after being asked to leave, the League's members picketed at the public entrance to the Kaplans' neighborhood, rather than the Kaplans' home itself. On 11 January 1992, however, the League returned to the Kaplans' home, once again destroying the Kaplans' privacy and sense of security.

On 14 January 1992, the Kaplans filed this action for injunctive relief and damages. They sought a preliminary injunction limited to the League's residential picketing and in-person threats. The superior court granted a preliminary injunction, restraining only these acts pending trial. The injunction does not cover any other expressive conduct of the League, such as its residential leafletting. In this interlocutory appeal, the League seeks to have this injunction vacated, and, presumably, to resume its picketing campaign at the Kaplans' home.

Proceedings

The Kaplans do not contest the League's statement of the proceedings below, except for the League's summary of the reasoning of the court of appeals. See Pet. at 6-7. That summary is inaccurate in three respects.

First, the League errs by asserting that the court of appeals "identified no basis -- other than the peaceful residential marching itself -- for holding petitioners' marching to be a nuisance." *Id.* at 6. In fact, after considering the entire record, the court agreed that the League had interfered with the Kaplans' use and enjoyment of their property in a substantial, nontrespassory way. See *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 11, 21-23, 431 S.E.2d 828, 832, 838-39, Pet. App. at 1a, 7a, 20a-22a, *appeal dismissed and disc. rev. denied*, 335 N.C. 175, 436 S.E.2d 379 (1993). It specifically noted the "substantial disruption of plaintiffs' residential privacy

due to defendants' actions." *Id.* at 25, 431 S.E.2d at 840, Pet. App. at 25a. In the end, the court found ample evidence to support the trial court's overall conclusion that the Kaplans would likely prevail on their private nuisance claim. *Id.* at 24, 431 S.E.2d at 840, Pet. App. at 24a.

Second, when the court decided that the League's residential picketing was targeted at the Kaplans, it noted the coercive *purpose* of the picketing, but it did not rely on the picketing's *message* or other expressive content. See *id.* at 25-26, 431 S.E.2d at 841, Pet. App. at 26a (analysis of targeting); Pet. at 6 (League's argument); see also *Kaplan*, 111 N.C. App. at 29, 431 S.E.2d at 843, Pet. App. at 30a ("We conclude that the trial court did not focus on the effect or impact of defendants' message on potential listeners, but rather on defendants' physical presence having a deliberate intimidating effect on plaintiffs while at their home."); *infra* p. 21 (showing how *Frisby v. Schultz*, 487 U.S. 474 (1988), refutes the League's argument that the court could not rely on the purpose of the picketing).

Finally, the League superimposes its arguments on the reasoning of the court of appeals when it asserts that the court "applied the time, place, and manner test *for statutes, ordinances, and regulations*." Pet. at 6 (emphasis added). The League argued below that the time, place, and manner test is limited to these types of measures, but the court of appeals did not accept that argument. See *Kaplan*, 111 N.C. App. at 27-28, 431 S.E.2d at 842, Pet. App. at 28a-29a; see also *infra* pp. 17-18 (noting that this argument lacks support in this Court's decisions).

REASONS FOR DENYING THE WRIT

The League's petition has two fatal jurisdictional defects. First, the petition was filed out of time, 103 days after the North Carolina Supreme Court entered its order dismissing the League's appeal. Second, the order at issue does not qualify for review under 28 U.S.C. § 1257(a) (1988), because it is interlocutory, not final.

Even aside from these jurisdictional problems (and their prudential implications), there is no reason for the Court to review the state courts' interlocutory orders in this case. Contrary to the League's assertions, there is no conflict among the lower courts on the federal constitutional principles applied below. In situations like the one faced by the Kaplans, the lower courts have consistently granted and upheld injunctive relief against residential picketing. In addition, the courts in this case have faithfully followed this Court's decisions under the First Amendment, including *Frisby v. Schultz*, 487 U.S. 474 (1988).

I. THE PETITION IS UNTIMELY.

The Court lacks jurisdiction to grant the petition, which was filed out of time. Section 2101(c) of title 28 requires that a petition for certiorari be filed within ninety days after the entry of the relevant judgment or decree. 28 U.S.C. § 2101(c); *accord* Sup. Ct. R. 13.1 (requiring petitioners to file petitions within ninety days after entry of orders denying discretionary review). In *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990), the Court held that this ninety-day time limit is mandatory and jurisdictional.

Although the North Carolina Supreme Court entered its order dismissing the appeal on 7 October 1993, the League waited until 18 January 1994 to file its petition. The League thus missed the ninety-day deadline for the petition by almost two weeks.

The text of the state supreme court's order makes clear that the order was entered on 7 October 1993. The order states: "The following order *was entered and is hereby certified* to the North Carolina Court of Appeals." Pet. App. at 57a (emphasis added). The order goes on to state that the appeal was dismissed and the petition for discretionary review was denied on 7 October 1993. *Id.* at 57a-58a. The only other date on the order comes at the very bottom, where the clerk of court states, "Witness my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 1993." *Id.* at 58a. The verb tenses in the italicized portion of the order above make clear that the order was entered by the court on one date (7 October 1993) and certified by the clerk on another (18 October 1993).

Confirming this plain meaning, both the official *North Carolina Reports* and West's *Southeastern Reports* show the sole date of the order as 7 October 1993. *See Kaplan v. Prolife Action League*, 335 N.C. 175, 436 S.E.2d 379 (1993). Since the petition for certiorari was filed more than ninety days after the order was entered, the Supreme Court should deny the petition for lack of jurisdiction. *Cf. Jenkins*, 495 U.S. at 45 (noting that the Court dismisses untimely petitions).

II. THE SUPREME COURT LACKS JURISDICTION UNDER 28 U.S.C. § 1257(a) BECAUSE THE NORTH CAROLINA SUPREME COURT'S ORDER IS NOT A FINAL JUDGMENT.

Under 28 U.S.C. § 1257(a), the Supreme Court can review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." This finality requirement in section 1257(a) is jurisdictional. *See, e.g., Asarco, Inc. v. Kadish*, 490 U.S. 605, 611 (1989). A petitioner has the burden of establishing the Supreme Court's jurisdiction, and any doubts should be resolved against jurisdiction. *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71 (1948).

The North Carolina Supreme Court's dismissal of the appeal from the preliminary injunction lacks finality for two reasons. First, that court's order is interlocutory, and does not fall within any of the special categories recognized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-86 (1975). Second, the state supreme court's order is not final for all the parties involved in this case. See, e.g., *Collins v. Miller*, 252 U.S. 364, 370 (1920); *Meagher v. Minnesota Thresher Mfg. Co.*, 145 U.S. 608, 611 (1892).

A. *The North Carolina Supreme Court's Order Is Not Final.*

Neither a dismissal of an appeal from a preliminary injunction nor a related denial of discretionary review is a final judgment or decree under 28 U.S.C. § 1257(a). An order lacks finality, after all, unless it is "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945). More recently, this Court has reiterated that "the final-judgment rule has been interpreted 'to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)); accord *Pennsylvania v. Ritchie*, 480 U.S. 39, 47 (1987).

In this case, the court of appeals expressly recognized the lack of finality of the preliminary injunction proceedings. It stated that a preliminary injunction's "impact is temporary and lasts no longer than the pendency of the action. Its decree bears no precedent to guide the final determination of the rights of the parties. In form, purpose, and effect, it is purely interlocutory." *Kaplan*, 111 N.C. App. at 14, 431 S.E.2d at 834, Pet. App. at 11a (quoting *A.E.P. Indus. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (in turn quoting

earlier decision))). When the state supreme court dismissed the League's interlocutory appeal from such an injunction, that court's order was a merely interlocutory or intermediate step in this litigation, not a final determination of it. *Market Street Railway*, 324 U.S. at 551.

In *Cox Broadcasting*, 420 U.S. at 477-86, this Court identified four categories of cases in which a state court's decision regarding federal issues can be treated as final, even though additional proceedings in the state court are expected.³ The dismissal of the appeal from the preliminary injunction does not fit within any of these categories. See *id.* Since the supreme court's order is an interlocutory order that falls outside these categories, this Court lacks jurisdiction. See *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 127 (1981); *Flynt*, 451 U.S. at 623.

B. *The North Carolina Supreme Court's Order Is Final for Fewer Than All the Parties Involved in This Case.*

The North Carolina Supreme Court's order is not a final judgment under section 1257(a) for a second, independent reason: even if it were final for the League entity and the Winfields, it would still be final for fewer than all the individual defendants in this lawsuit. See *Collins*, 252 U.S. at 370; *Meagher*, 145 U.S. at 611; see also *Minnick*, 452 U.S. at 126-27 (holding that state court judgment lacked finality, in part because additional plaintiffs might have presented claims and new evidence on remand). Not all of the "Doe" defendants in this case have been identified. Others have been so recently named that they have not yet answered the complaint, or even

³Although *Cox Broadcasting* involved a nondiscretionary appeal, the Court has used the *Cox Broadcasting* categories to decide whether it has certiorari jurisdiction. See, e.g., *Asarco*, 490 U.S. at 612; *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 120-27 (1981); *Flynt*, 451 U.S. at 620-23.

received service of process. In fact, only two of the fifty-three people who were defendants on the date of the preliminary injunction have pursued this interlocutory appeal.

In *Meagher*, 145 U.S. at 608, this Court faced a similar situation. The Court noted that the appellants were "only a portion of the defendants who were proceeded against" and held that "[t]he case should have been determined as to all, before our interposition, if justifiable in any view, could be invoked." *Id.* at 611. Here, likewise, the North Carolina courts have not decided even the most preliminary issues regarding many of the individual defendants. For these defendants at least, the North Carolina Supreme Court's order cannot be final. On this basis alone, the Court lacks jurisdiction to grant certiorari.

C. *Even If the Court Deems the North Carolina Supreme Court's Order Final for Jurisdictional Purposes, It Should Deny the Petition in Its Discretion.*

Jurisdictional concerns aside, a state court's interlocutory order makes a poor candidate for discretionary review. See, e.g., *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947) (declining to hear an interlocutory appeal from the highest court of California, despite jurisdiction to do so). Even under the statute governing certiorari to federal courts, which does not expressly require final judgments as section 1257(a) does, the Court generally refuses to review interlocutory orders, absent extraordinary circumstances. See, e.g., 28 U.S.C. § 1254(1); *Virginia Military Inst. v. United States*, 113 S. Ct. 2431, 2432 (1993) (Scalia, J., concurring); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostok R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893).

This policy of requiring finality applies to state court decisions with even greater force. See *Radio Station WOW*, 326 U.S. at 124. When a state court decision is challenged, the finality requirement not only promotes judicial economy and

expedites final decisions, but also recognizes that the state courts have concurrent jurisdiction with the federal courts on federal issues. This Court recently stated that when it considers reviewing state court decisions, it keeps federalism in mind and gives proper consideration to "the judgment of other repositories of constitutional power concerning the scope of their authority." *Minnick*, 452 U.S. at 122 n.30 (quoting *Rescue Army*, 331 U.S. at 571).

Denying the petition would have the vital additional benefit of allowing the North Carolina courts to develop the record fully before this Court decides any federal issues presented. See *Cox Broadcasting*, 420 U.S. at 478 n.7 (noting that the inconvenience and costs of piecemeal appellate review are among the key considerations that govern finality). As stated earlier, this petition comes before some of the defendants have even been identified. At a trial on the merits, those defendants will have an opportunity to present evidence that might change the course of the litigation, or at least change the facts underlying some of the federal issues. See *infra* pp. 13-14 (noting that the League's claims regarding the scope of injunctive relief turn on case-specific facts).

This disadvantage of interlocutory review is especially acute here, given the provisional nature of the fact findings supporting the preliminary injunction. The trial court granted the preliminary injunction before any discovery, relying mostly on affidavits filed by the Kaplans and the League. See Pet. App. at 44a-45a. Before a permanent injunction could issue, much more evidence would become part of the state court record. When all this evidence is in, the Court will be in a far better position to decide any federal issues presented by this case.

III. THE DECISION OF THE COURT OF APPEALS ACCORDS WITH OTHER LOWER COURTS' DECISIONS ON RESIDENTIAL PICKETING; THE CONFLICTS ALLEGED BY THE LEAGUE ARE ILLUSORY.

Even if one looks past the jurisdictional and prudential problems with the petition, the petition still should fail, because it raises no legal issues worthy of this Court's review. The lower-court conflicts portrayed in the petition, for example, cannot withstand analysis. The lower courts have unanimously accepted the principle that injunctions against focused residential picketing comport with the First Amendment. The minor variations among the lower-court cases reflect differences in factual records, not conflicts in legal reasoning.

A. *Like the Valenzuela Court, the Courts Below Required That Injunctive Relief Be Based on a Valid Cause of Action.*

The League's assertion that "the decision below treats residential demonstrations as *per se* unlawful and enjoined" is false. Pet. at 9. The North Carolina courts demanded, as a prerequisite to the preliminary injunction, that the Kaplans show themselves likely to prove a tort or another cause of action. See Pet. App. at 46a (finding the Kaplans likely to prevail on the merits of their claims for private nuisance and intentional infliction of emotional distress); *Kaplan*, 111 N.C. App. at 16-25, 431 S.E.2d at 835-41, Pet. App. at 13a-25a (analyzing both these preliminary findings in detail; accepting only the finding on private nuisance).

Valenzuela v. Aquino, 853 S.W.2d 512, 513-14 (Tex. 1993), which the League cites as conflicting, actually reflects the same approach. Reviewing a permanent injunction, the Texas Supreme Court searched the record for evidence of a civil wrong under Texas law. See *id.* at 513 (noting that the Aquinos had prevailed only on negligent infliction of emotional

distress, and that the Texas Supreme Court had disapproved this tort after the *Valenzuela* trial). The court found no such evidence,⁴ but it still remanded to allow the Aquinos to assert new tort claims. See *id.* at 514. By doing so, it confirmed that an injunction against residential picketing could be upheld if supported by a cause of action. Thus, the only relevant difference between *Valenzuela* and this case is that the Kaplans have shown the tortious conduct that the *Valenzuela* court found missing under Texas law.

B. *There Is No Conflict in the Cases Involving Injunctions Against Residential Picketing.*

Contrary to the League's argument that the scope of the preliminary injunction conflicts with certain decisions, see Pet. at 10-11, there is no legal conflict in the cases involving injunctions against residential picketing. In determining whether the geographical scopes of residential picketing injunctions comply with the Constitution, the courts have consistently applied the same legal standards. They have upheld injunctions of varying geographical scopes, but they have done so in response to facts that have varied from case to case. See, e.g., *Northeast Women's Ctr., Inc. v. McMonagle*, 939 F.2d 57, 67 (3d Cir. 1991) (stating that additional facts might justify a residential picketing injunction with a radius as great as 2500 feet); *Welsh v. Johnson*, 508 N.W.2d 212, 216 (Minn. Ct. App. 1993) (holding that a two-block restriction was constitutional in light of the facts).

Like the courts in these and many other cases, cited by the League elsewhere in its petition (see Pet. at 7 n.1), the courts below allowed injunctive relief that was narrowly tailored to the harm shown in this case. See *Kaplan*, 111 N.C. App. at 34-35,

⁴The Texas court made its observation that residential picketing is "not unlawful *per se*" as it rejected a second tort theory of the Aquinos, invasion of privacy. See *Valenzuela*, 853 S.W.2d at 513-14.

431 S.E.2d at 846-47, Pet. App. at 36a-39a; Pet. App. at 47a (¶ 9). The following are some of the facts relevant to the scope of the present injunction:

- The League picketed at the Kaplans' home as often as once a day.
- The League's picket line contained as many as twenty-five people, making one or more picketers constantly visible from the Kaplans' home.
- The picketing involved people who had carried out a year-long campaign of harassment against the Kaplans, and who were in league with a person who had directly threatened Dr. Kaplan's life.
- The Kaplans live on a short, dead-end street in a quiet residential neighborhood. *See, e.g.*, Pet. App. at 59a.
- The League has innumerable alternatives to picketing at the Kaplans' house, including leafletting or soliciting on the Kaplans' street, picketing in other parts of the Kaplans' neighborhood, picketing at Dr. Kaplan's medical office, and picketing at abortion clinics.

The scope of the injunction cannot be analyzed without detailed review of these and other facts. *See Kaplan*, 111 N.C. App. at 34, 431 S.E.2d at 846, Pet. App. at 37a (analyzing additional facts on this issue).

This Court does not ordinarily grant certiorari to weigh case-specific facts such as these. *See, e.g., Texas v. Mead*, 465 U.S. 1041, 1043 (1984); *United States v. Johnson*, 268 U.S. 220, 227 (1925). On the present petition, the Court should hesitate doubly before agreeing to sift facts, since the present record relates only to interlocutory relief. That record will be far better developed after a trial on the merits.

To create an apparent conflict in the cases on residential picketing, the League relies on decisions that construe anti-residential-picketing ordinances. *See Pet.* at 10-11. Those

cases are not comparable to this one. Anti-picketing ordinances are construed narrowly because, unlike injunctions, they operate in advance of any demonstrated harm, and they prohibit *anyone* from picketing in front of *any* individual's residence. *See, e.g., Town of Barrington v. Blake*, 568 A.2d 1015, 1021 (R.I. 1990).

C. This Case Is Distinguishable from *Cheffer*.

The conclusion that the present injunction is content-neutral does not conflict with the conclusion in *Cheffer v. McGregor*, 6 F.3d 705, 710 (11th Cir. 1993), that a different injunction was "viewpoint-based."

Cheffer turns on an issue absent from this case: how the persons bound by an injunction have been identified. *See id.* at 710-11. The plaintiff in *Cheffer* alleges that Florida courts and police are applying an injunction to anti-abortion protesters exclusively and indiscriminately, on the view that all anti-abortion protesters must be acting in concert. *See id.* at 707. In the passage quoted by the League and in other places, the *Cheffer* decision focuses on viewpoint-specific application of this injunction. *See id.* at 707, 708, 710, 711 & n.6; *see also Grayned v. City of Rockford*, 408 U.S. 104, 113 (1972) (discriminatory use of a neutral regulation to punish people "for merely expressing unpopular views" violates First Amendment).⁵

⁵A case related to *Cheffer* involves similar allegations. In *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664 (Fla. 1993), *cert. denied*, 62 U.S.L.W. 3491 (U.S. Jan. 24, 1994) (No. 93-833), *cert. granted sub nom. Madsen v. Women's Health Ctr., Inc.*, 114 S. Ct. 907 (1994) (No. 93-880), the petitioners apparently contend that the trial court has enjoined them through a similar viewpoint-based technique. *See* Petition for Writ of Certiorari at 3, *Madsen*, No. 93-880 (U.S. Dec. 3, 1993) ("Petitioners . . . were not associated with those protesters blocking the clinics or with Operation Rescue.").

In contrast, neither *Cheffer* nor any other case accepts the League's argument here, that an injunction with content-neutral terms is content-based simply because it applies to named defendants. See Pet. at 12-13. This proposition does conflict with the decision below, but it has been soundly rejected by this Court and by the lower courts. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *Northeast Women's Center*, 939 F.2d at 63 ("It is true that this injunction applies only to McMonagle and his codefendants, but that is because it is only those persons who the Center has proved have created and are continuing to create a threat of violence and intimidation."). If the persons affected by the present injunction turn out to be "pro-life demonstrators and no one else," Pet. at 12, it will be because only "pro-life demonstrators" have invaded the Kaplans' privacy. The League has identified no court willing to condemn this sensible outcome.

IV. THE DECISION BELOW FOLLOWS THIS COURT'S FIRST AMENDMENT TEACHINGS.

Throughout this case, and again in its petition, the League has argued that this Court's First Amendment decisions categorically protect the League's campaign to break the Kaplans. These arguments misread the decisions of this Court and misstate the facts of this case.

A. *The Court of Appeals Faithfully Applied This Court's Teachings on Prior Restraints.*

The League argues that the court of appeals erred by not automatically applying prior restraint analysis to the preliminary injunction. See *id.* at 13. Contrary to the League's argument, not all injunctions that relate to expressive conduct are prior restraints.

As the court of appeals correctly noted, an injunction to remedy a private wrong, such as tortious picketing, is not a prior restraint. See, e.g., *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-19 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 709 (1931); *Kaplan*, 111 N.C. App. at 30-31, 431 S.E.2d at 844, Pet. App. at 32a-33a. This Court and the lower courts have consistently upheld injunctions against tortious picketing without condemning those injunctions as prior restraints. See, e.g., *American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 229-30 (1974); *Hughes v. Superior Court*, 339 U.S. 460, 467-69 (1950); *Bering v. SHARE*, 106 Wash. 2d 212, 235-37, 721 P.2d 918, 932-33 (1986), *cert. dismissed*, 479 U.S. 1050 (1987).

Two of the Supreme Court cases cited by the League, in fact, show that an injunction to regulate specific, tortious, expressive conduct stands on a different footing from injunctions that suppress speech generally. See Pet. at 13-14. In *Keefe*, this Court condemned an injunction because it operated "not to redress alleged private wrongs, but to suppress . . . distribution of literature 'of any kind' in a city of 18,000." *Keefe*, 402 U.S. at 418-19 (quoting injunction).⁶ Likewise, in *Carroll v. President & Commissioners*, 393 U.S. 175 (1968), the injunction did not redress a private wrong, but was a government's naked attempt to suppress a public rally anywhere within a county. See *id.* at 177 n.3.

The present injunction, in contrast, has not cut off the League's expression before its occurrence. Instead, it has regulated the place and manner of the League's expressive

⁶In *Keefe*, this Court did not consider whether injunctions against residential picketing are prior restraints. See *Keefe*, 402 U.S. at 417 (noting that the record lacked any evidence of residential picketing). Rather, the Court condemned an injunction against leafletting, which the Court later expressly distinguished from residential picketing as a "more generally directed means of communication." *Frisby v. Schultz*, 487 U.S. 474, 486 (1988); see *Keefe*, 402 U.S. at 417-20.

conduct, redressing torts already experienced by the Kaplans twelve times. The injunction is thus more analogous to a subsequent punishment than to a prior restraint. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) (noting that commission's order was based on a continuing course of repetitive conduct by defendants, and stating that the Court "has never held that all injunctions are impermissible"); *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287, 294-95 (1941) ("Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct.").

In sum, the courts below did not stray from established First Amendment doctrine by applying time, place, and manner analysis to this injunction. See, e.g., *Hirsh v. City of Atlanta*, 495 U.S. 927, 927 (1990) (Stevens, J., concurring in denial of stay) (expressing approval of injunctions that impose time, place, and manner regulations based on protesters' prior conduct). This Court has not prohibited courts from using time, place, and manner analysis to review a content-neutral injunction like this one. The League has failed to point out any conflict between the appeals court's analysis and this Court's teachings regarding prior restraints.

B. *The Preliminary Relief Granted Below Is Consistent with Frisby v. Schultz.*

In comparing the present injunction with this Court's authoritative decision on residential picketing, the League has inaccurately portrayed both of the items being compared. See Pet. at 15 (discussing *Frisby v. Schultz*, 487 U.S. 474 (1988)).

First, the injunction at issue creates nothing like a "speech-free zone." *Id.* Even on the Kaplans' short street, the injunction does not bar the League from proselytizing door-to-door, distributing or mailing handbills, or contacting residents by

phone. See *Kaplan*, 111 N.C. App. at 36, 431 S.E.2d at 847, Pet. App. at 39a; see also *Frisby*, 487 U.S. at 484 (stating that these alternatives, plus one other, justified a citywide ban on residential picketing). The League can also picket in other parts of the Kaplans' neighborhood, as it did at least once before this lawsuit began. See, e.g., Pet. App. at 46a (¶ 7); see also *Frisby*, 487 U.S. at 484 (noting final alternative channel: "Protesters have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching . . .") (emphasis added). Thus, even if one accepts the League's view that the Kaplans' neighborhood is the only expressive venue worth discussing, the injunction is not silencing the League. See Pet. at 15; see also *Kaplan*, 111 N.C. App. at 36, 431 S.E.2d at 847, Pet. App. at 39a (noting the many other outlets available for the League's expression, including medical facilities).

Second, the League's argument that *Frisby v. Schultz* bars any regulation of picketing that extends beyond the frontage of one house, Pet. at 15, has no support in that Supreme Court decision or any other. In *Frisby*, the Court held it constitutional to ban targeted residential picketing in the interest of residential privacy, and it defined targeted picketing by its intended and actual effects on its targets. See *Frisby*, 487 U.S. at 486-87.

The *Frisby* Court did assume that the challenged ordinance banned "only focused picketing taking place solely in front of a particular residence." *Id.* at 483. This factual assumption does not mean, however, that no picketing that goes beyond one house can be targeted picketing. The Court's legal reasoning, indeed, disproves this assertion. The Court emphasized "[t]he devastating effect of targeted picketing," not just one-house picketing, "on the quiet enjoyment of the home." *Id.* at 486.

The present case illustrates how picketers can move beyond the frontage of one house, yet still target a family in its home and cause the "unique and subtle impact" condemned in *Frisby*. *Id.* at 487. Appearing as often as daily, the League's members

walked back and forth in front of the Kaplans' home in groups as large as twenty-five, carrying signs that named Dr. Kaplan as the object of their picketing. In no meaningful sense was this picketing "transient." Pet. at 15. Indeed, when the League obliquely complains that the injunction keeps it away from "a given residence," *id.*, it admits that its picketing is "narrowly directed at [that] household, not the public," *Frisby*, 487 U.S. at 486.

In sum, the *Frisby* Court's reasoning applies a fortiori to the remedial injunction in this case. In *Frisby*, the devastating effects of residential picketing justified a citywide ban on that picketing. Here, these same effects amply justify a ban that focuses on one short street. See Pet. App. at 47a-48a, 59a. The *Frisby* Court asked whether the ordinance "protect[ed] only unwilling recipients of the [picketers'] communications." 487 U.S. at 485. In this case, this requirement is readily satisfied, because only these unwilling recipients are seeking injunctive relief.

C. The Record Refutes the League's Assertion That the Injunction Is Content-based.

Finally, the League argues that the injunction fails two of this Court's tests for content-neutrality. The record contradicts both of these arguments.

First, the League has no basis for asserting that the injunction "singles out only those bearing a particular message." Pet. at 15. The injunction does not use the messages of any enjoined activities to identify those activities. It applies to all picketing, threats, and similar actions within its scope, stating no exceptions. See Pet. App. at 44a-48a; *see also supra* p. 16 (showing that the fact that the injunction applies to named defendants does not make it content-based).

The League's second argument, that the injunction was entered "precisely because of the impact of the petitioners' message of protest upon the respondents," is equally baseless.

Pet. at 17. Both courts below made express findings that refute this argument. Pet. App. at 47a ("An injunction to stop targeted residential picketing in the Kaplans' neighborhood is based not on the content of any would-be picketers' speech, but on the effects caused by the picketers' physical presence."); *accord Kaplan*, 111 N.C. App. at 29, 431 S.E.2d at 843, Pet. App. at 30a-31a. Nor did the courts use content-based reasoning when they decided that the League's picketing was targeted at the Kaplans. See *id.* at 25-26, 431 S.E.2d at 841, Pet. App. at 26a; Pet. at 17. In *Frisby*, the Court cited similar evidence of targeting, *see* 487 U.S. at 486-87, but turned aside claims that the related regulation was content-based, *see id.* at 482.⁷

The injunction rests not on the League's message, but on the coercive, physical way the League has repeatedly delivered that message. See *Kaplan*, 111 N.C. App. at 29, 431 S.E.2d at 843, Pet. App. at 30a-31a; Pet. App. at 45a, 47a; *see also Frisby*, 487 U.S. at 487 (characterizing the ordinance in that case as a "regulation[] of form and context," rather than a "regulation of communications due to the ideas expressed") (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 84 (1983) (Stevens, J., concurring in the judgment)).

⁷The passages that the League has extracted from *Boos v. Barry*, 485 U.S. 312 (1988), played no role in the later *Frisby* decision. They have no role to play here. See *Frisby*, 487 U.S. at 481-82; Pet. at 16-17.

CONCLUSION

The Kaplans respectfully request that the Court deny the petition.

Respectfully submitted,

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APPENDIX

Subsection (c) of 28 U.S.C. § 2101 provides:

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Subsection (a) of 28 U.S.C. § 1257 provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.